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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1307

EVERETT L. TURPIN,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City, Missouri,
HArrison 1-0556,
Attorney for Petitioner.

Of Counsel:

DWIGHT ROBERTS,
HOMER R. HINES and
RAYMOND, WEST & COCHRANE,
All of Kansas City, Missouri.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner Everett L. Turpin, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri, *in Banc*, against him on January 10, 1966, in the case of *Everett L. Turpin* v. *Chicago, Burlington & Quincy Railroad Company, a Corporation*, Number 51,026, brought and tried under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, *et seq.*

(a) OPINIONS BELOW

(References are to the machine page numbers on the outside lower corner)

No opinion was filed by the trial court. A copy of its judgment appears in the Appendix hereto as Exhibit D, p. A33.

The unanimous opinion of Division Number One of the Supreme Court of Missouri, filed on April 12, 1965, reversing the judgment of the trial court entering judgment for defendant *non obstante veredicto* and remanding the case for new trial was not published as the case was thereafter transferred to the Court, *in Banc,* of the Court's own Motion (R. 366). A true copy of said opinion is set out in full in the record at pages 327 to 340 and in the Appendix at pages A1 to A14 (Exh. A).

The unanimous opinion of the Supreme Court of Missouri, *in Banc,* filed January 10, 1966, affirming the judgment of the trial court for defendant *non obstante veredicto* is not yet reported but is set out in full at pages 369 to 384 of the record and in the Appendix at pages A15 to A33 (Exh. C).

(b) JURISDICTION

(i) The judgment of the trial Court for defendant *non obstante veredicto* was entered on August 14, 1964. (R. 319)

The judgment of the Supreme Court of Missouri, *in Banc,* was dated and entered January 10, 1966. (R. 368, Exh. B)

(ii) The order of the Supreme Court of Missouri, *in Banc,* denying appellant's motion for rehearing was entered on February 14, 1966. (R. 399)

The Supreme Court of Missouri, *in Banc,* is the highest Court of Appellate Jurisdiction in the State of Missouri. Missouri Constitution, 1945, Sections 2 and 7. Petitioner has no further remedy by appellate review in the State Courts of Missouri.

An order was entered on February 28, 1966, by the Supreme Court of Missouri, *in Banc,* staying all further proceedings for a period of 90 days from February 14, 1966, to enable petitioner to apply to this Court for a writ of certiorari herein. (R. 403, Exh. E, p. A34)

(iii) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), the pertinent parts of which are:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

Jurisdiction is also invoked under the provisions of the Federal Employers Liability Act, 45 U.S.C.A., Sec. 51, *et seq.,* as this action was specifically brought and tried under the provisions of such Act.

The following cases are believed to sustain the jurisdiction of this Court: *Ward* v. *Atlantic Coast Line R. Co.,* 362 U.S. 396, 80 S. Ct. 789; *Dennis* v. *The Denver & Rio Grande Western Railroad Co.,* 375 U.S. 208, 84 S. Ct. 291;

Gallick v. *The Baltimore and Ohio Railroad Company*, 372 U.S. 108, 83 S. Ct. 659; *Senko* v. *La Crosse Dredging Corporation*, 352 U.S. 370, 371-372, 374, 77 S. Ct. 415, 416, 417; *Basham* v. *Pennsylvania Railroad Company*, 372 U.S. 699, 83 S. Ct. 965.

(c) QUESTIONS PRESENTED FOR REVIEW

It being admitted by the defendant's answer (R. 14) that at the time in question, petitioner was engaged in duties in connection with loading trucks piggy-back on defendant's Railroad car located in the railroad yards of defendant in North Kansas City, Missouri, and the cars and trucks being loaded thereon were engaged in interstate commerce, but it being denied that petitioner was under any supervision of defendant or of its agents or employees, the questions presented for review are:

First: Whether the Supreme Court of Missouri erred in holding the rule in Federal Employers' Liability Act cases that any evidence "even the slightest" will make a jury issue is limited to issues of negligence only and may not be applied to the issue of employment or employee status of this petitioner and thereby brought its opinion into conflict with controlling decisions of this and other Federal Appellate Courts?

Second: Whether the Missouri Supreme Court erred in holding the evidence in this case was insufficient to make a jury issue on whether petitioner was an employee of Railroad and thereby brought its opinion into direct conflict with controlling decisions of the Court and the United States Courts of Appeals in similar cases?

Third: Whether the Missouri Supreme Court erred in holding the evidence in this case was insufficient to

make a jury issue on whether Railroad's wholly owned subsidiary Burlington Truck Lines, Inc., had independent existence in form only and was not in fact an operating division of Railroad in corporate form completely dominated and controlled by its parent Railroad and thereby brought its opinion into direct conflict with controlling decisions of this Court and the United States Courts of Appeals in similar cases?

Fourth: Whether the evidence does not make a jury issue on whether the organization and manner of operation by Railroad of its wholly owned and controlled subsidiary or operational division was not a device to enable Railroad as a common carrier by Railroad to exempt itself from any liability under the provisions of the Federal Employers' Liability Act?

(d) STATUTORY PROVISIONS INVOLVED

28 U. S. Code Annotated, Sec. 1257:

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

45 U. S. Code Annotated, Sec. 51:

"§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or territories, or between the District of Columbia and any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of

this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

45 U. S. Code Annotated, Sec. 55:

"§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, § 5, 35 Stat. 66."

(e) STATEMENT OF FACTS

(Chicago, Burlington & Quincy Railroad Company is referred to herein as "Railroad" and Burlington Truck Lines, Inc., is referred to as "Truck Lines." The opinion of the Supreme Court of Missouri, *in Banc,* is referred to as *"Banc* Op.")

A total of twelve jurors (R. 312), four Judges and three Commissioners of Division No. 1 of the Supreme Court of Missouri (R. 325-341; Exh. A) have held that the evidence justifies with reason a verdict for plaintiff, although on rehearing before the Missouri Supreme Court, *in Banc,* the four Judges of Division No. 1 reversed them-

selves and joined with the other three Judges of the Court, *in Banc*, in a unanimous decision to the contrary. (R. 369-384, Exh. C)

From the evidence adduced at the trial, the jury could have reasonably, and apparently did, conclude that plaintiff's primary employer, Burlington Truck Lines, Inc., was a wholly-owned and dominated subsidiary of respondent, Chicago, Burlington & Quincy Railroad Company. (R. 31, 237, *Banc* Op., Exh. C, p. A16)

Truck Lines was dominated by officials of Railroad manning key positions in the Truck Line organization as follows:

J. J. Alms, Executive Assistant to the President of Railroad was President of Truck Lines. (R. 42, 43, 244, 290)

A. D. McLane, Secretary of Railroad was Secretary and Assistant Treasurer of Truck Lines. (R. 42, Trial Exhs. 9, 10)

R. W. Coglan was Treasurer of Railroad and Treasurer and Assistant Secretary of Truck Lines. (R. 42, Trial Exhs. 9, 10)

Eldon Martin was Vice-President and General Counsel of Railroad and a Director and General Counsel of Truck Lines. (R. 43, 244, Trial Exh. 9)

F. E. Sperry was Assistant Vice-President in the Operating Department of Railroad and a Director of Truck Lines. (R. 43, 243, Trial Exh. 9)

R. C. Smith was Comptroller of Railroad and a Director of Truck Lines. (R. 43, 244, 290, Trial Exh. 9)

G. R. Glover was Vice-President of Traffic for Railroad and a Director of Truck Lines. (R. 43, 244, Trial Exh. 9)

Defendant Railroad was the owner, builder, maintainer and operator of a large railroad terminal and freight house and the loading and unloading ramps and catwalks connected therewith in North Kansas City, Missouri, where plaintiff was working at the time of his injury. (R. 32, 27, 273, *Banc* Op., Exh. C, pp. A17-A18)

That in accordance with admissions in defendant's First Amended Answer "on March eleventh, 1961 (the date of plaintiff's injury) plaintiff was engaged in various duties in the employ of the truck line in connection with the loading trucks, piggy-back, on defendant's railroad car located in the railroad yards of defendant in North Kansas City, Missouri, and there was a ramp running alongside of the track and cars at said time and place, and that said cars and the trucks being located thereon were engaged in interstate commerce." (R. 14, 27-28, 31, 32, *Banc* Op., Exh. C, pp. A16-A19) The trailers being loaded by plaintiff were scheduled to move by train over the Burlington Railroad. (R. 79, 80)

Truck Lines was a tenant of Railroad with its general headquarters in the terminal and freight house in North Kansas City, which was not divided between them, and the two jointly occupied and used all the space and facilities in common. (R. 143, 228, 229, 239, 240, 241, 260, 262, *Banc* Op., Exh. C, p. A17)

Railroad was engaged in the so-called "piggy-back" hauling of highway trailers, loaded and unloaded, on railway flatcars in railroad transportation. (R. 231, 232, 260, 262, *Banc* Op., Exh. C, p. A17)

Railroad owned some highway trailers, but no tractors or motive equipment for use in loading or unloading from railroad cars. (R. 241, 266, 268, *Banc* Op., Exh. C, p. A17)

Truck Lines owned highway trailers and also tractors and motive equipment, some of which had special equipment for loading and unloading trailers. (R. 231, 232, *Banc* Op., Exh. C, p. A17)

The trailers of both Railroad and Truck Lines were kept in a common pool for common use in service to the trade. (R. 244, 245) Both used the name "Burlington" indiscriminatorily on their respective trailers. (R. 244, 245)

While Truck Lines kept its finances separate, billed Railroad for services to it and paid Railroad for rents and services furnished by Railroad (R. 227, *Banc* Op., Exh. C, p. A16), the two companies had the same General Counsel (R. 236, 237, 242); both used the Railroad's Claim Department (R. 229, 230, 241, 242, 243, 244); both used the Railroad's Law Department except for local matters (R. 242, 241, 229); other than local doctors, Truck Lines used the doctors and medical department of Railroad (R. 230, 35, 36, 62, 63, 229); both used the same special agents or detectives. (R. 262, 240, 241, 230) Railroad as sole stockholder of Truck Lines receives no dividends from Truck Line operations—any available money is used for equipment and expansion. (R. 239)

While having no formal contract with Truck Lines Railroad did have formal contracts with other truckers doing similar work for it. (R. 286)

Railroad and Truck Lines issued coordinated rail bills and truck bills carried under bill-of-lading on Railroad. (R. 231, 80, 81, 287)

Railroad issued free passes to Truck Line employees on occasion, including plaintiff, but issued no such passes to employees of other companies rendering similar service for Railroad. (R. 141, 142, 269, 270, 279, 280, *Banc* Op., Exh. C, p. A22)

Part of the tools used by plaintiff and other employees of Truck Lines in loading and unloading trailers in the piggy-back service at Railroad's Terminal were furnished by Railroad. (R. 189, 190, 207, 186, 205, 208, *Banc* Op., Exh. C, pp. A20-A22)

Railroad furnished a caterpillar tractor for use in pulling tractors and trailers out of mud holes on its premises. (R. 208, 180, 194, 195, 196, 112, *Banc* Op., Exh. C, p. A21)

The evidence shows the following acts of control of Truck Lines employees by Railroad officials and supervisors:

Railroad inspectors and switch crews maintained inspection of the railroad cars as to their condition for loading and also as to whether they were properly loaded, and gave plaintiff and other Truck Line employees instructions as to such matters which had to be obeyed. (R. 84, 85, 86, 118, 120, 121, 110, 185, 182, 183, 205, *Banc* Op., Exh. C, p. A20)

Railroad Rip Track Foreman, Ned Vincent, frequently gave employees directions as to how the piggy-back cars were to be unloaded. (R. 185, 186, *Banc* Op. Exh. C, p. A20)

Mr. Frank West, Roadmaster of Railroad, directed Truck Lines employees to use the Railroad's caterpillar tractor to move trailers in the piggy-back operation. (R. 181, 195, 196, 180, *Banc* Op., Exh. C, p. A21)

Mr. West and Railroad Superintendent (name not shown) once directed Truck Lines employees in loading a highway matting onto a piggy-back car. (R. 181, 182)

Railroad notified Truck Lines when piggy-back cars would arrive and where they would be set for unloading. (R. 123, 134) Following a wreck at Orrick, Truck Line employees unloaded a number of cars involved in the wreck—both flat cars and piggy-back cars—under directions of Railroad Roadmaster West, Railroad Superin-

tendent (name not given) and Truck Lines Manager Cooper. (R. 184, 185, *Banc* Op., Exh. C, p. A22)

In the latter part of 1957 or 1958, Railroad had a large shipment of about 45 cars of flour to be loaded for shipment overseas within a day. Railroad Superintendent, Railroad Roadmaster West, and other railroad men directed and instructed Truck Lines employees in loading these cars. (R. 198, 199, 202, 203, 204, *Banc* Op., Exh. C, pp. A21-A22)

SUMMARY

Plaintiff's primary employer, Truck Lines, was a wholly-owned subsidiary of Railroad controlled through officials of the railroad manning key positions in Truck Lines; the work being done was part of Railroad's general business and at the time plaintiff was engaged in furthering the operational activities of Railroad; the terminal, ramps and catwalk where plaintiff was working were all owned, in possession of and operated by Railroad; a caterpillar tractor and certain small tools were furnished by Railroad for use by Truck Lines employees; the piggy-back car plaintiff was helping unload belonged to Railroad; Railroad and Truck Lines used Railroad's terminal in common and without division of quarters; Railroad and Truck Lines used the same claim service, same Legal Department, same Medical Department, same detective service, had common officers in part and had the same General Counsel; employees of Truck Lines loaded and unloaded piggy-back cars as directed by Railroad and under the supervision of Railroad supervisors, switch crews, riptrack foreman, superintendent and roadmaster. Upon emergency or unusual situations Railroad officials took charge and directed the activities of Truck Lines employees demonstrating Railroad had the right of control and exercised that right whenever desired.

(f) MANNER OF RAISING FEDERAL QUESTION

In his petition based on the Federal Employers' Liability Act, petitioner alleged he was an employee of Truck Lines, a wholly owned subsidiary of Railroad, an interstate carrier, and at the times mentioned in evidence was under the general supervision of defendant Railroad and was at the time loading trucks piggy-back on defendant's railroad car in defendant's railroad yards and was using defendant's ramp in furtherance of interstate transportation and commerce. (R. 10-11)

In its amended answer on which the case was tried, defendant Railroad denied petitioner was ever its employee but was an employee of Truck Lines and not of Railroad and denied that petitioner was ever at any time under the supervision of defendant Railroad or its agents or employees. (R. 5-6)

At the close of plaintiff's evidence, defendant Railroad moved for a directed verdict on the sole ground that plaintiff failed to prove that he was an employee of defendant Railroad at the time of his injury. (R. 221)

At the close of all the evidence, defendant Railroad renewed its motion for a directed verdict on the same ground. (R. 299)

Following the verdict for plaintiff, defendant Railroad filed its motion for judgment or in the alternative for new trial renewing its charge that plaintiff had not proved he was an employee of defendant Railroad. (Par. I(a) of said Motion, R. 313)

The trial Court sustained defendant's motion for judgment on the sole ground plaintiff had failed to prove he was an employee of defendant within the meaning of the Federal Employers' Liability Act. (R. 319)

The Supreme Court of Missouri affirmed the judgment of the trial Court on the ground plaintiff had failed to prove he was an employee of defendant Railroad within the meaning of the Federal Employers' Liability Act. (R. 372-384)

Petitioner assigned error in that regard as a ground for his motion for a rehearing before the Missouri Supreme Court, *in Banc.* (R. 386-394). Petitioner's motion was overruled. (R. 399)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

The Supreme Court of Missouri Erred in Holding the Rule in Federal Employers Liability Cases That Any Evidence "Even the Slightest" Will Make a Jury Issue Is Limited to Issues of Negligence Only and May Not Be Applied to the Issue of Employment or Employee Status.

In attempting to distinguish cases of this Court applying the above rule of evidence in Federal Employers Liability cases, the Supreme Court of Missouri stated (R 376, Exh. C, p. A23):

> "Those cases all involved issues of negligence or proximate cause under FELA, and it was to the proof on those questions that the remarks relied upon by plaintiff were directed. On the other hand, it seems clear that the burden of proving employment by the defendant in FELA cases is on the plaintiff, that this question is to be determined under general law (general federal law, if there is a difference), and that the terms 'employer' and 'employee' are used in the act in their usual and natural sense."

Having started off on the wrong legal standard, the Missouri Supreme Court proceeded to state the facts favorable to the defendant's viewpoint and to draw the inferences in favor of defendant and against the jury verdict in favor of plaintiff.

Railroad cites no decisions of this Court or any other Court holding this rule in FELA cases is limited to negligence issues and may not be applied to issues of employment or employee status.

Cases directly in point to the contrary are found in cases under the Jones Act, 46 U.S.C.A., Sec. 688, wherein it is provided:

> "* * * and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

In the case of *Dixon* v. *Serodino, Inc.*, 6 Cir., 331 F.2d 668, the Court in ruling a case under the Jones Act said (l.c. 673):

> "Substantive Federal law controls Jones Act litigation, which in turn is governed in general by the rules and decisions which enforce the Federal Employers Liability Act, Title 45, U.S.C.A. § 51 et seq. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493; Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 77 S. Ct. 459, 1 L. Ed. 2d 515; De Lima v. Trinidad Corporation, 302 F. 2d 585, 588 (C.A. 2, 1962); Urie v. Thompson, 337 U.S. 163, 172, 69 S. Ct. 1018, 93 L. Ed. 1282."

The question of employment or employee status involves the merits and therefore substantive law. *Nelson* v. *Green Line Streamers*, 6 Cir., 255 F.2d 31, 34.

In the case of *Senko* v. *La Crosse Dredging Corporation*, 352 U.S. 370, 371-372, 374, 77 S. Ct. 415, the Court,

in ruling a seaman case, stated the law as follows (l.c. 416):

> "In South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 732, we said that whether or not an employee is ' "a member of a crew" turns on questions of fact' and that, if a finding on this question has evidence to support it, the finding is conclusive. Id., 309 U.S. at pages 257-258, 60 S. Ct. at pages 547-548. The sole question presented here, therefore, is whether there is an evidentiary basis for the jury's finding that petitioner was a member of a crew at the time of his injury. This finding was made under specific instructions not objected to here."

(l.c. 417:)

> "We believe, however, that our decision in South Chicago Coal & Dock Co. v. Bassett, supra, has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

In the case of *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U.S. 355, 360, 82 S. Ct. 780, 784, in a case under the Longshoremen's Act, this Court pointed out that in that case, the plaintiff had "the right to trial by jury. As in cases under the Jones Act * * * and under the Federal Employers' Liability Act * * *." In support of that statement, the Court cited the case of *Rogers* v. *Missouri Pac. R. Co.,* 252 U.S. 500, 77 S. Ct. 443, and other FELA cases, thereby indicating applicability of the same rules in FELA and Jones Act cases.

In the case of *Adams* v. *Kelly Drilling Co.*, 5 Cir., 273 F.2d 887, in a case under the Jones Act involving the status of plaintiff as an employee, there was a jury verdict for defendant and plaintiff appealed. In affirming the judgment, the Court there said (l.c. 889):

> "In addition, plaintiff contends that reasonable minds could not fail, under applicable law, to conclude that he was a seaman and member of a crew of a vessel, and that the judgment must be reversed and here rendered for him.
>
> "On their part, the appellees, pointing out that it is the province of the jury to determine, whether a person is a seaman and a member of the crew of a vessel under the Jones Act and for the purpose of recovering under the warranty of seaworthiness, argues that the jury's decision is final, if there is evidence to support it, whether or not the district or appellate court agrees with the jury's conclusion, cases note 2, supra, and that even the slightest evidence is sufficient to support a verdict. Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 507, 77 S. Ct. 443, 1 L. Ed. 2d 493; Offshore Co. v. Robison, note 2, supra."

(l.c. 890:)

> "We agree with appellees that at least in the present state of the decisions, the issues in the case were for the jury and the evidence did not demand, indeed it did not permit, the direction of a verdict for either plaintiff or defendant."

In the case of *Offshore Company* v. *Robison*, 5 Cir., 266 F.2d 769, in a case under the Jones Act in affirming a jury verdict for plaintiff, the Court said (l.c. 773):

> "[1] There are two aspects to the question at issue: (1) What is required in law to constitute a maritime worker a seaman and a member of a crew? (2) In the circumstances of this case, is the question one for the court or for the jury?"

(l.c. 780:)

> "[7] Under the Jones Act, judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the claimant was a seaman, a member of a crew of a vessel. In the recent case of Rogers v. Missouri Pacific R. Co., 1957, 352 U.S. 500, 507, 77 S. Ct. 443, 448, 1 L. Ed. 2d 493, in an analogous situation, the Supreme Court stated that under the FELA 'the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought'. Even if the test were *substantial supporting evidence,* on the record as it comes to us, we would have to hold that there was a sufficient evidentiary basis for the trial court to submit the case to the jury."
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> * * *
>
> "There is no reason for lamentations. Expansion of the terms 'seaman' and 'vessel' are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act."

That case recognizes the FELA Rogers case as authority in Jones Act cases.

In the case of *Keymon* v. *Tennessee Towing Co.,* 6 Cir., 296 F.2d 784, in a Jones Act case in affirming a jury verdict for plaintiff, the Court said (l.c. 786):

> "It is thoroughly established that the Jones Act must be liberally construed as remedial legislation for the benefit and protection of seamen. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265; Wilkes v. Mississippi Sand & Gravel Co., 202 F.2d

383, 387 (C.A. 6); Offshore Co. v. Robison, 266 F.2d 769, 774, 75 A.L.R. 2d 1296 (C.A. 5)."

* * *

"The Supreme Court of the United States has been vigorous in reversing decisions which take away from the jury cases in Jones Act proceedings, and in holding that whether a particular plaintiff is entitled to the protection of the Jones Act is a jury issue under the circumstances of each case. Gianfala v. Texas Co., 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775; Butler v. Whiteman, 356 U.S. 271, 78 S. Ct. 734, 2 L. Ed. 2d 754; Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129, 80 S. Ct. 247, 4 L. Ed. 2d 191; Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 77 S. Ct. 415, 1 L. Ed. 2d 404; and Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 78 S. Ct. 687, 2 L. Ed. 2d 737."

"[4] Under the foregoing authorities, we think there was substantial evidence to support the finding of the jury in the present case that the plaintiff-appellee was, at the time he received his injuries, a seaman within the meaning of the Jones Act."

That is in line with the Rogers case showing similar vigilance of this Court in FELA cases.

See to like effect, *Mach* v. *Pennsylvania Railroad Co.*, 3 Cir., 317 F.2d 761, 763 (2). *Bernardo* v. *Bethlehem Steel Co.*, 2 Cir., 314 F.2d 604, 608 (2).

In the case of *Ratigan* v. *New York Central Railroad Co.*, 2 Cir., 291 F.2d 548, the Court said (l.c. 553):

"The law applicable to this phase of the case is federal law and the Supreme Court has told us in various ways and on numerous occasions that in these FELA cases the railroad employee is to be given the benefit of every doubt. (citing thirteen cases)."

See to like effect *Kodak* v. *Long Island Railroad Company*, 2 Cir., 342 F.2d 244, 247 (2).

The leading case with which we believe this opinion of the Supreme Court of Missouri comes into direct conflict is likewise a Missouri case: *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 506, 507, 509, 510, 77 S. Ct. 443. In that case, the issue was that of proximate cause while here it is that of employee status or employment. We believe the above cases have demonstrated the same rule as to admeasuring the evidence necessary to make a jury issue on the question of negligence applied to employee status.

In that case, the Supreme Court of Missouri erroneously applied the wrong standard. This Court there said (77 S. Ct., l.c. 448):

> "The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case there was no case for the jury. But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would not have occurred but for the negligence' of his employer, and that '[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred.' That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.

"[6-8] Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

(l.c. 449:)

"[9, 10] The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

(l.c. 450:)

"[11-16] Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury

determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. Similarly, once certiorari is granted, the fact that the case arises under the Federal Employers' Liability Act cannot in any wise justify a failure on our part to afford the litigants the same measure of review on the merits as in every other case.

"The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

II

The Missouri Supreme Court Erred in Holding the Evidence in This Case Was Insufficient to Make a Jury Issue on Whether Plaintiff Was an Employee of Railroad and Thereby Brought Its Opinion into Direct Conflict with Controlling Decisions of This Court and the United States Courts of Appeals in Similar Cases.

In the case of *Reed* v. *Pennsylvania Railroad Company,* 351 U.S. 502, 76 S. Ct. 958, the Court in a FELA case stated (l.c. 961):

> "[8-10] We think that the present petitioner is employed by the respondent in interstate commerce within the meaning of the 1939 amendment to § 1. Although the amendment may have been prompted by a specific desire to obviate certain court-made rules limiting coverage, the language used goes far beyond that narrow objective. It evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding questions of coverage. Under the amendment, it is the 'duties' of the employee that must further or affect commerce, and it is enough if 'any part' of those duties has the requisite effect. The statute commands us to examine the purpose and effect of the employee's function in the railroad's interstate operation, without limitation to nonclerical employees or determination on the basis of the employee's importance as an individual in the railroad's organization."

In the case of *Eresafe* v. *New York, New Haven & Hartford R. Co.,* 2 Cir., 250 F.2d 619, in a case brought under the Federal Employers' Liability Act, the Court said (l.c. 621:)

> "The Act should be liberally construed in favor of the employee. It is remedial legislation."

The evidence here clearly justified the jury in finding that plaintiff at the time of his injury was performing the work of Railroad in loading Railroad's piggy-back car on Railroad's premises for shipment over Railroad's tracks.

In the case of *Byrne* v. *Pennsylvania Railroad Company*, 3 Cir., 262 F.2d 906, the Court, in affirming a jury verdict for plaintiff in a FELA case, said (l.c. 908):

> "It is clear that at the time of his death Irby, an electrical engineer, thirty-two years old, was an employee of Westinghouse Electric Corporation. He was killed while working on one of four electric locomotives, built by Westinghouse and purchased from Westinghouse by the defendant, the Pennsylvania Railroad Company. The locomotive in which Irby was killed was in the car shops of the Railroad at Wilmington, Delaware."

(l.c. 910:)

> "There is, of course, no question but that Irby was an employee of Westinghouse. The issue is whether sufficient evidence was adduced to enable the jury to conclude that Irby was also an employee of the Railroad."
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> * * *
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> "The designation of a vendor's employee to work with the vended equipment on the vendee's premises does not necessarily establish an employment relationship between the vendee and the employee assigned by the vendor. On the other hand a vendee may not make use of that employee, having him 'do its work' and exercising the 'right to control' him, accompanied by other incidents usually connected with employment, and escape the responsibility imposed by the federal statute. The evidence as to Irby's employment looks two ways and it is impossible indeed to draw a line of demarcation between the work Irby performed for Westinghouse and that which he did for the Railroad. The evidence would support the conclusion that

he was, to some extent at least, a common employee of both.

"[2] This issue became one for the jury." (l.c. 911:)

"In the Shaw opinion at the page indicated we also said in footnote 4, cited to the text of that opinion: 'Whose work is being done seems to have been the most important factor in Supreme Court decisions in somewhat similar cases', citing Linstead v. Chesapeake & Ohio Ry., 1928, 276 U.S. 28, 48 S. Ct. 241, 72 L. Ed. 453, and Hull v. Philadelphia & Reading Ry. Co., 1920, 252 U.S. 475, 40 S. Ct. 358, 64 L. Ed. 670."

(l.c. 912:)

"[6, 7] The jury was entitled to find the foregoing as facts and to conclude that the Railroad had a right of control over Irby and that he was engaged in maintaining its services, i. e. doing its work. Cf. Reed v. Pennsylvania R. R. Co., 1956, 351 U.S. 502, 76 S. Ct. 958, 100 L. Ed. 1366. The jury was entitled to reconcile the operative facts if it could do so, and attribute such weight as it desired to particular incidents and to find under a proper charge that Irby was an employee of the Railroad. Ellis v. Union Pac. R. R. Co., 1947, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572; Lavender v. Kurn, 1946, 327 U.S. 645, 6 S. Ct. 740, 90 L. Ed. 916.

"It is clear that the court below did not err in submitting the issue of whether Irby was employed by the Railroad to the jury."

In the case of *Armit* v. *Loveland,* 3 Cir., 115 F.2d 308, in a Jones Act case, the Court said (l.c. 314):

"The fact that the plaintiff was employed on the 'Hoodless' at the time of his injury is not in dispute, and it was possible for him to have more than one employer. Restatement of the Law, Agency, § 226. If the defendants so scrambled their relations as to render

it difficult for anyone to say for a certainty whether the plaintiff was employed by only one or by all of them that should not serve to defeat the plaintiff's right by relieving a responsible defendant. To hold otherwise would be to put a premium upon the confusion which the defendants themselves created. The ones responsible for it should be the ones to dispel it, which they can do by adjusting their respective liabilities inter se. In the circumstances here present, we can see no legal necessity for requiring the plaintiff to grope around in search of his employer's identity among corporate entities and individuals, all of whom are shoots off the same stock and engaged in a common activity. A verdict against all three defendants was warranted. Lang et al. v. Hanlon et al., 302 Pa. 173, 178, 153 A. 143."

Division No. 1 of the Missouri Supreme Court upon the first hearing on appeal wrote an opinion stating facts favorable to plaintiff as shown in the record and drawing inference favorable to plaintiff and unanimously reversed the judgment for defendant *non obstante veredicto* and affirmed the order for a new trial.

We submit the later opinion of the Supreme Court of Missouri, *in Banc,* emphasizing the facts favorable to defendant, minimizing the facts favorable to plaintiff and drawing all inferences against plaintiff is in direct conflict with the opinion of this Court in the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S. Ct. 409, where the Court stated the law as follows (l.c. 412):

"[6-8] It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the

contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; Tiller v. Atlantic Coast Line R. Co., supra, 318 U.S. 68, 63 S. Ct. 451, 143 A.L.R. 967; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

See to like effect *Gallick* v. *Baltimore and Ohio Railroad Company*, 372 U.S. 108, 115, 83 S. Ct. 659, 664.

We submit the opinion of the Missouri Supreme Court, *in Banc*, in this case is in direct conflict with the case of *Cimorelli* v. *New York Cent. R. Co.*, 6 Cir., 148 F.2d 575, under similar facts ruling to the contrary.

The Cimorelli case was cited with approval in *Ward* v. *Atlantic Coast Line R. Co.*, 362 U.S. 396, 400, 80 S. Ct. 789, 792 and adopted and followed in the case of *Baker* v. *Texas and Pacific Railway Co.*, 359 U.S. 227, 228, 229, 79 S. Ct. 664.

The Baker case involved an employee of an independent contractor engaged in doing work on the roadbed to strengthen it. The State Courts of Texas held petitioner was not an employee of defendant Railway as a matter of law. In reversing the judgment, this Court said (79 S. Ct., l.c. 665):

"[2-5] The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense, Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, 35 S. Ct. 491, 494, 59 L. Ed. 849, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves at matters of federal law under the Act. See Linstead v. Chesapeake & Ohio R. Co., 276 U.S. 28, 33-34, 48 S. Ct. 241, 243, 72 L. Ed. 453. It has been well said of the question that '[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative.' Cimorelli v. New York Central R. Co., 6 Cir., 148 F.2d 575, 577. Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement, Agency 2d, § 220, comment *c*; 227, comment *a*. Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. See Chicago, R. I. & P. R. Co. v. Bond, 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735. Here the petitioners introduced evidence tending to prove that the grouting work was part of the maintenance task of the railroad; that the road furnished the material to be pumped into the roadbed; and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture. The railroad introduced evidence tending to controvert this and further evidence tending to show that an employment relationship did not exist between it and Baker at the time of the accident. An issue for determination by the jury was presented. 'The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that

which it considers most reasonable.' Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520."

We submit the work of petitioner herein in loading defendant's piggy-back car, standing on defendant's track at defendant's dock for shipment interstate over Railroad's lines was activity in furtherance of Railroad's business operation and was work done to further the task of Railroad's enterprise just as much as work improving the track in the Baker case. We submit the distinction between this case and the Baker case attempted to be made by the Missouri Supreme Court is invalid and that the opinion of that Court herein is in direct and irreconcilable conflict with the opinion of this Court in the Baker case.

We submit the opinion of the Missouri Supreme Court herein is likewise and for the same reason in direct conflict with the opinion of this Court in the case of *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 78 S. Ct. 758, and the case of *Ward* v. *Atlantic Coast Line R. Co., supra.*

III

The Missouri Supreme Court Erred in Holding the Evidence in This Case Was Insufficient to Make a Jury Issue on Whether Railroad's Wholly Owned Subsidiary Burlington Truck Lines, Inc., Had Independent Existence in Form Only and Was Not in Fact Merely an Operating Division of Railroad in Corporate Form Completely Dominated and Controlled by Its Parent Railroad.

In the case of *Bowater Steamship Company* v. *Patterson*, 2 Cir., 303 F.2d 369, the Court in a labor case involving shipping said (l.c. 372):

"Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked, or answered, *in vacuo,*' Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 603 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law. Contrast Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 37 S. Ct. 506, 61 L. Ed. 1148 (1917), and Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 38 S. Ct. 553, 62 L. Ed. 1229 (1918), with In re Gibraltar Amusements, Ltd., 291 F.2d 22 (2 Cir.), cert. denied, 368 U.S. 925, 82 S. Ct. 360, 7 L. Ed. 2d 190 (1961), and Empresa Hondurene de Vapores, S. A. v. McLeod, 300 F.2d 222 (2 Cir. 1962)."

In the case of *National Bond Finance Company* v. *General Motors Corporation,* 8 Cir., 341 F.2d 1022, the Court said (l.c. 1023):

"[2, 3] The question of whether a corporation is an instrumentality or an alter ego of another corporation presents primarily an issue of fact to determine upon the basis of the facts of each individual case. The clearly-erroneous rule set forth in Fed. R. Civ. P. 52(a) applies. Consolidated Sun Ray, Inc. v. Oppenstein, supra; Francis O. Day Co. v. Shapiro, 105 U.S. App. D. C. 392, 267 F.2d 669, 674; Fish v. East, 10 Cir., 114 F.2d 177, 191."

The clearly-erroneous rule is applicable here in reviewing the jury verdict below for plaintiff.

In the case of *National Dairy Products Corporation* v. *United States,* 8 Cir., 350 F.2d 321, in a Sherman Act case, the Court said (l.c. 327):

"[4, 5] The evidence clearly indicates that Chapman was not an *independent* subsidiary of National. The relationship between parent and subsidiary was not one of stock ownership alone. Chapman was run

by National in accordance with National's policies and objectives, and with independent existence in form only. In such a situation the courts may disregard the legal fiction of corporate entity. Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 501, 38 S. Ct. 553, 62 L. Ed. 1229 (1918). See also Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510, 61 S. Ct. 675, 85 L. Ed. 982 (1941); United States v. Delaware, Lackawanna & Western R. R. Co., 238 U.S. 516, 35 S. Ct. 873, 59 L. Ed. 1438 (1915). Cf. Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8 Cir. 1964). Since Chapman Dairy was merely an operating division of National Dairy in corporate form, the jury was entitled to find National liable for any conspiratorial conduct in which Chapman might have engaged with its distributor, Martin, prior to the formal merger of Chapman with National on December 31, 1956."

We submit in this case the jury reasonably could have found that Truck Lines was run by Railroad in accordance with Railroad's policies and objectives and that Truck Lines had independent existence in form only; that Truck Lines was merely an operating division of Railroad.

In the case of *N. L. R. B.* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-404, 80 S. Ct. 441, in a labor case, this Court stated the law as follows (l.c. 443):

"But we think the Board is entitled to show that these separate corporations are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise.' That is the alternative theory of liability which the Court of Appeals did not consider. We think that the Board is entitled to a hearing on that alternative theory and to discovery in aid of it.

"[2, 3] The question whether the corporations under Weiner's ownership were only departments or divisions in one single enterprise is in a different category than those that arise under either 13 Eliz. or the modern law of preferences. Whether one corporation is liable for the obligations of an affiliate turns on other considerations. The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception. See Pullman's Palace Car Co. v. Missouri Pacific R. Co., 115 U.S. 587, 597, 6 S. Ct. 194, 198, 29 L. Ed. 499. Yet as Mr. Justice Cardozo said in Berkey v. Third Avenue R. Co., 244 N.Y. 84, 95, 155 N.E. 58, 61, 50 A.L.R., 599, 'Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice.' That is not a complete catalogue. The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations, as the authorities recognize. See Lattin on Corporations (1959) ch. 2, §§ 13, 14; Stevens on Corporations (1949) § 17; Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343."

We submit the jury here reasonably could have found that "the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities."; that Truck Lines was operated as a division of Railroad and the affairs of the two were so intermingled that no distinct corporate lines were maintained.

Railroad as sole stockholder receives no dividends—any profits go into equipment and expansion. (R. 239)

We submit the ruling of the Supreme Court of Missouri in this case is in direct conflict with the controlling decision of this Court in the case of *Shenker* v. *Baltimore and Ohio Railroad Company,* 374 U.S. 1, 10-11, 83 S. Ct. 1667, where in a FELA case, this Court said (l.c. 1673):

> "[11, 12] Although recovery in this case is supported by the common law, it is also required by any reasonable construction of the Federal Employers' Liability Act itself. As we stated in Sinkler v. Missouri Pac. R. Co., 356 U.S. 326, 330, 78 S. Ct. 758, 762, 2 L. Ed. 2d 799: 'it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor.' If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk. Cf. Texas & Pac. R. Co. v. Archibald, 170 U.S. 665, 673, 18 S. Ct. 777, 42 L. Ed. 1188.
>
> "[13] In our opinion the case was submitted to the jury under proper instructions, and there was a reasonable basis in the evidence for the verdict which the jury returned."

Here the Truck Lines and Railroad constituted a unitary enterprise and its economic resources should bear the burden of all injuries arising out of the fault of either.

We contend the fiction of a corporate entity for Truck Lines was adopted to avoid the provisions of a statute, to wit, 45 U.S.C.A. 51, *et seq.*

In the recent case of *Kavanaugh* v. *Ford Motor Co.*, 7 Cir., 353 F.2d 710, the Court said (l.c. 717):

> "[4] It is settled doctrine that the fiction of corporate entity will be disregarded whenever it has been adopted or used to evade the provisions of a statute. Schenley Distillers Corp. v. United States, 326 U.S. 432, 437, 66 S. Ct. 247, 90 L. Ed. 181 (1946); United States v. Lehigh Valley R. R. Co., 220 U.S. 257, 272, 31 S. Ct. 387, 55 L. Ed. 458 (1911); Metropolitan Holding Co. v. Snyder, 79 F.2d 263, 266, 103 A.L.R. 912 (8th Cir. 1935). For the reasons we have demonstrated, the Dealers' Day in Court Act would be subverted in the instant case if the corporate format adopted by the parties were given recognition. Hence, we must 'pierce the veil' of the corporate entity and look to the substance and reality of the situation. In the interest of justice, the corporate fiction must be ignored.
>
> "[5] Ford argues that the record affords no proof that the dealership corporation was created for the purpose of evading the statute. The answer is twofold. First, the totality of facts reasonably supports the inference that the corporate format was deliberately adopted in order to defeat the legislative purpose of the act. Second, regardless of intent, the format, if given recognition, effectively insulates Ford from liability under the act. It is inconceivable that Ford, owning all the voting stock of the dealership corporation and being in complete control of it, would ever seek the protection afforded by the statute. Intention is not controlling when the fiction of corporate entity defeats a legislative purpose. 'The question is whether the parties did what they intended to do and whether what they did contravened the policy of the law.' Anderson v. Abbott, 321 U.S. 349, 358, 64 S. Ct. 531, 536, 88 L. Ed. 793 (1944)."

CONCLUSION

The Supreme Court of Missouri, *in Banc*, in reversing the unanimous verdict of the jury has invaded the province of the jury and its opinion conclusively shows that it has failed to follow the teachings of this Court. Certiorari should be granted in this instance to "correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. R. Co.* (352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 493).

Respectfully submitted,

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City, Missouri,
HArrison 1-0556,
Attorney for Petitioner.

Of Counsel:

DWIGHT ROBERTS,
HOMER R. HINES and
RAYMOND, WEST & COCHRANE,
All of Kansas City, Missouri.